UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **KYLE KENNELLY ABEL**, Debtor.	Case No. **04-62970-7**
FIRST SECURITY BANK, Plaintiff. -vs- **KYLE KENNELLY ABLE**, Defendant.	Adv No. **04-00136**

MEMORANDUM of DECISION

At Butte in said District this 8th day of June, 2005.

In this Adversary Proceeding, after due notice, trial was held in this matter in Butte on May 10, 2005. The Plaintiff, First Security Bank ("FSB"), was represented at the trial by attorney Calvin L. Braaksma and the Defendant, Kyle Kennelly Able ("Debtor"), was represented at the trial by attorney James J. Screnar. Maggie S. Anderson, a senior vice president for FSB, and Debtor testified. Exhibits 1 through 12 and 14 were admitted into evidence without objection. Exhibit 13 was admitted into evidence after Debtor's objection to the admission of Exhibit 13 was sustained in part and overruled in part. At the conclusion of the trial, the Court granted Debtor 15 days to file a post-trial brief. Debtor's brief was filed on May 24, 2005. The

matter is thus ready for decision.

FSB commenced this Adversary Proceeding on December 20, 2004, seeking to except from discharge the debt owed by Debtor to FSB under 11 U.S.C. §§ 523(a)(2)(A) and (a)(2)(B). Debtor answered FSB's Complaint on February 11, 2005, denying several of the allegations set forth in FSB's Complaint, requesting that the Complaint be dismissed and requesting that the Court find that the obligation owing by Debtor to FSB is a dischargeable obligation.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding to determine the dischargeability of a particular debt under 28 U.S.C. § 157(b)(2)(I). This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law pursuant to F.R.B.P. 7052.

BACKGROUND

Pursuant to the Pretrial Order filed by FSB and Debtor on April 29, 2005, the parties agree on the following facts:

1. Defendant and William P. Abel (then Defendant's husband, now Defendant's former husband) borrowed $550,000.00 from Plaintiff on or about April 26, 2001. Defendant [and William P. Abel] pledged certain real property and personal property to secure that loan.

2. Defendant and William P. Abel defaulted on that loan.

3. The Montana Eighteenth Judicial District Court issued its Judgment and Decree of Foreclosure on September 16, 2003, in favor of Plaintiff and against Defendant and William P. Abel. The amount of the Judgment was $548,253.95 (plus interest, attorney fees and costs).

4. Defendant filed her voluntary Chapter 7 petition on September 28, 2004.

In addition to the above agreed facts, the evidence presented at the trial shows that Debtor

and another individual, presumably William P. Abel, approached Maggie S. Anderson ("Maggie") at FSB hoping to secure a loan to purchase a home and real estate. According to Debtor, Debtor approached FSB with the hopes of obtaining loans to buy a house and start a business. Debtor and William P. Abel intended to use their home, if purchased, as a bed and breakfast and a livery. During the loan application process, FSB requested documentation from Debtor and William P. Abel, including a financial statement, projections regarding income and expenses, documentation pertaining to a lawsuit between Debtor and Melvin Pervais and documentation relating to a family trust.

With regard to the financial statement introduced as Exhibit 8, the following exchange took place between Debtor and her counsel:

Mr. Screnar: The financial statement that is presented here today is the document that you prepared?

Debtor: Yes.

Mr. Screnar: You're familiar with that statement and you've seem it before?

Debtor: Yes, I am.

Mr. Screnar: In preparation of the financial statement, you listed all you assets?

Debtor: I did, yes.

Debtor also executed an "Assignment of Percentage of Rights" whereby Debtor assigned 60 percent of her total award of the Melvin Pervais lawsuit to FSB. Finally, FSB was provided with two pages of a trust document, which according to Debtor, was provided to FSB by either "Billy or myself."

Based upon the documentation provided to FSB by Debtor and William P. Abel and

based upon statements made by Debtor to Maggie, FSB advanced $350,000.00 to Debtor and William P. Abel for the purpose of "PROPERTY ACQUISITION - BED & BREAKFAST" on or about April 26, 2001. Exhibit 1. The first loan was secured by a Montana Trust Indenture dated April 26, 2001. Exhibit 2. By separate Note and Security Agreement, FSB advanced additional sums to Debtor and William P. Abel for the purpose of "BED & BREAKFAST/LIVERY-BUSINESS START UP". Exhibit 3. The second loan was secured by the Montana Trust Indenture and by other assets, such as Debtor's interest in the lawsuit against Melvin Pervais. Exhibits 3 and 4.

The second loan of approximately $200,000.00 was set up on a short term basis because Maggie understood that the Kennelly Family Trust could loan up to $300,000.00 against a viable business. As provided in FSB's loan comment sheet:

> Kyle has a contract due from a suit she won in Missoula, the amount due is $360M, and it is being collected by Garlington, Lohn & Robinson in Missoula[.] There is a dispute on the amount of payment due. She has other funds accessible through the Kennelly Family trust. Their intention is to incorporate [and] after 3 months of operation . . . the trust can loan up to $300,000M for investment in a corporation or viable business. If the funds do not come from the settlement then they will use the funds that can be loan[ed] out by the Trust.

Exhibit 12.

Debtor and William P. Abel defaulted almost immediately on the above obligations and on September 16, 2003, the Montana Eighteenth Judicial District Court, Gallatin County, entered a Judgment and Decree of Foreclosure in the amount of $548,253.95, together with interest and late fees in the amount of $82,104.93 to September 8, 2003, together with interest thereafter at the rate set forth in the Promissory Notes for loan nos. 210175 and 210178. Exhibit 7. According to the Judgment and Decree of Foreclosure, the issue as to attorney fees was to be

decided at a later date. *Id*.

To date, Debtor has not received any monies from her lawsuit against Melvin Pervais. Additionally, Debtor claims that the Kennelly Family Trust cannot provide the $300,000.00 in promised funding because the trust was never funded. Debtor maintains that FSB knew that the Kennelly Family Trust was not funded because the sole source of funding was to come from Debtor's lawsuit against Melvin Pervais. Maggie contends that Debtor never mentioned that the funding for the Kennelly Family Trust was to come from the lawsuit against Melvin Pervais. FSB thus asserts that the deficiency still owing on the obligations owed by Debtor should be excepted from discharge because FSB was lead to believe that the Kennelly Family Trust could provide financing of up to $300,000.00 once the bed and breakfast and livery business was fully operational.

DISCUSSION

In a nondischargeability claim the burden of proof falls on the creditor to prove the elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991) ("we hold that the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard."); *In re Branam*, 226 B.R. 45, 52 (9th Cir. BAP 1998), *aff'd*, 205 F.3d 1350 (9th Cir. 1999). A creditor's burden, in conjunction with the "fresh start" policy of the Bankruptcy Code, creates a sizeable obstacle for creditors to overcome in order to prevail on a non-dischargeability complaint. *In re Tyler*, 19 Mont. B.R. 441, 447 (Bankr. D. Mont. 2002); *In re Ballew*, 18 Mont. B.R. 404, 410-11 (Bankr. D. Mont. 2000). As the Ninth Circuit Court of Appeals stated:

One of the fundamental policies of the Bankruptcy Code is the fresh start afforded

> debtors through the discharge of their debts. *In re Devers*, 759 F.2d 751, 754-55 (9th Cir. 1985). In order to effectuate the fresh start policy, exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor. *In re Klapp*, 706 F.2d 998, 999 (9th Cir. 1983).

Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992); *see also, In re Kidd*, 219 B.R. 278, 282, 16 Mont. B.R. 382, 386 (Bankr. Mont. 1998). Under this authority, FSB has the burden of proof under § 523(a); a sizeable obstacle which the Court must strictly construe against FSB and in favor of Debtor.

I. § 523(a)(2)(A).

To establish nondischargeability as a result of fraud under § 523(a)(2)(A)[1], courts in the Ninth Circuit employ the following five-element test, which requires that each element be proven by a preponderance of the evidence:

> (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
> (2) knowledge of the falsity or deceptiveness of [debtor's] statement or conduct;
> (3) an intent to deceive;
> (4) justifiable reliance by the creditor on the debtor's statement or conduct; and
> (5) damage to the creditor proximately caused by [creditor's] reliance on the debtor's statement or conduct.

Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir. 2001); *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),* 234 F.3d 1081, 1085 (9th Cir. 2000); *American*

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[1] 11 U.S.C. § 523(a)(2)(A) reads:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Express Travel Related Services Co., Inc., v. Hashemi (In re Hashemi), 104 F.3d 1122, 1125, *cert. denied*, 520 U.S. 1230, 117 S.Ct. 1824, 137 L.Ed.2d 1031 (1997); *Citibank (South Dakota), N.A., v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086 (9th Cir. 1996); *Apte v. Japra, M.D., F.A.C.C., Inc. (In re Apte)*, 96 F.3d 1319, 1322 (9th Cir. 1996); *Sparks v. King (In re King)*, 258 B.R. 786, 794 (Bankr. D. Mont. 2001); *Ballew*, 18 Mont. B.R. at 412-13.

In considering the

> . . . second element, a misrepresentation is made with fraudulent intent if the maker knows or believes that his statements are false. RESTATEMENT § 526[2]; *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 276 (2d Cir.1992). Accordingly, non-dischargeability under § 523(a)(2)(A) requires a finding of actual or positive fraud as opposed to fraud implied by law. *Palmacci v. Umpierrez*, 121 F.3d [781, 788 (1st Cir. 1997)]; [*Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 500 (Bankr. S.D.N.Y. 1999]; *see* 124 Cong. Rec. H11096 (daily ed. Sept. 28, 1978)(statement of Rep. Edwards); 124 Cong. Rec. S17412 (daily ed. Oct. 6, 1978)(statement of Sen. DeConcini). The party asserting nondischargeability must prove an actual intent to mislead; proof of mere negligence is not enough because the " 'dumb but honest' defendant does not satisfy the test of scienter." *Palmacci v. Umpierrez*, 121 F.3d at 788; *accord* RESTATEMENT § 526 cmt. d (1965)("The fact that the misrepresentation is one that a man of ordinary care and intelligence in the maker's situation would have recognized as false is not enough to impose liability upon the maker for a fraudulent misrepresentation under the rule stated in this Section, but it is evidence from which his lack of honest belief may be inferred.").

Morris, 252 B.R. at 48.

The fourth element, reliance, requires that such reliance is justifiable, not reasonable. *Apte*, 96 F.3d at 1322.

> Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of a particular case, rather than of the application of a community standard of conduct to all cases. . . . [A] person is 'required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the

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[2] Under RESTATEMENT § 526, fraudulent intent also includes a misrepresentation made without confidence in its accuracy or without any basis.

> falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. . . .

Fields v. Mans, 516 U.S. at 71, 116 S.Ct. at 444 (1995).

This Court explained in *Tyler*:

> The determination of non-dischargeability under § 523(a)(2)(A) is a question of federal, not state law and since the elements of the § 523(a)(2)(A) test mirror the common law elements of fraud, courts must interpret these elements consistent with the common law definition of "actual fraud" as set forth in the Restatement (Second) of Torts (1976) §§ 525-557A. *Field v. Mans*, 516 U.S. 59, 69, 116 S.Ct. 437, 443-44, 133 L.Ed.2d 351 (1995) ("'false pretenses, a false representation, or actual fraud,'...are common-law terms, and...in the case of 'actual fraud,'...they imply elements that the common law has defined them to include.").

Tyler, 19 Mont. B.R. at 448-49, quoting *Ballew*, 18 Mont. B.R. at 413.

In considering the nondischargeability of a debt arising through fraud under 11 U.S.C. § 523(a)(2)(A), one must consider the nature of the transaction. "Traditional credit transactions are two-party transactions between the debtor and the creditor." *Slyman*, 234 F.3d at 1086, quoting *Eashai*, 87 F.3d at 1087. These traditional credit transactions are in contrast to credit card transactions, which "involve three-parties: 1) the debtor/card holder; 2) the creditor/card issuer; and 3) the merchant who honors the credit card. The difficulty in credit card cases is for the creditor, who does not deal face-to-face with the debtor, to prove the elements of misrepresentation and reliance." *Id.* In three party transactions, the panel in *Eashai* adopted the totality of circumstances theory, wherein "a court may infer the existence of the debtor's intent not to pay if the facts and circumstances of particular case present a picture of deceptive conduct by the debtor." *Eashai*, 87 F.3d at 1087. The "totality of circumstances" theory is one of three theories applied in three-party transactions. The other two theories are the majority approach or "implied representation" theory and the minority approach or "assumption of the risk" theory.

Id. Under the totality of circumstances theory, *Eashai* adopts the twelve factors[3] from *In re Dougherty*, 84 B.R. 653 (9th Cir BAP 1988), "to establish the element of intent to deceive," or the "subjective intent of the debtor through circumstantial evidence" plus the elements of justifiable reliance and causation of damages. *Eashai*, 87 F.3d at 1088-90.

Eashai permits credit card companies to establish misrepresentation and reliance by reference to the totality of circumstances and does not require strict evidentiary proof of misrepresentation and reliance. *Slyman*, 234 F.3d at 1086.

> . . . [[T]wo-party credit] transactions do not bear the distinguishing characteristic of [three-party] transactions. Transactions between a credit card holder and a credit card company are intermediated by a third-party vendor. Transactions between a [debtor] and a [creditor], by contrast, are direct and without intermediation. Accordingly, we decline to apply the totality of the circumstances test to [two-party] transactions. A [creditor] must prove the elements of misrepresentation and reliance directly and by a preponderance of the evidence.

Id. Inferential existence of intent to deceive cannot be established in a two-party transaction under the totality of circumstances approach, wherein facts and circumstances of a particular case are used to determine deceptive conduct of a debtor. *Slyman*, 234 F.3d at 1086. This Court in three prior cases when discussing the nondischargeability of a debt under 11 U.S.C. § 523(a)(2)(A) in two-party transactions made references not only to direct evidence but also to

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[3] The factors are: (1) the length of time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges are made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities. *Eashai*, 87 F.3d at 1087-88 (citing *In re Dougherty*, 84 B.R. 653, 657 (9th Cir. BAP 1988), which was abrogated on other grounds).

considering the facts and circumstances of a particular case to determine through inference if deceptive conduct by the debtor occurred. *See Money Lenders v. Tyler (In re Tyler)*, 19 Mont. B.R. 441, 450 (Bankr. D. Mont. 2002), *Sparks v. King (In re King)*, 258 B.R. 786, 794-95 (Bankr. D. Mont. 2001), and *Ballew v. Ballew (In re Ballew)*, 18 Mont. B.R. 404, 414 (Bankr. D. Mont. 2000). Given the holding in *Slyman* regarding the need for direct evidence in two-party transactions, the reference in the above cited cases to, in essence, a totality of circumstances approach is in error. However, the Court, in *Tyler*, *King*, and *Ballew*, based its decision on the direct evidence, or lack thereof, and did not determine the outcome in such cases solely by applying the totality of circumstances approach.

II. § 523(a)(2)(B).

Section 523(a)(2)(B) prevents the discharge in bankruptcy of debts obtained through false representation. The statute reads:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
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> * * *
>
> (B) use of a statement in writing–
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive....

The Ninth Circuit has reworded these requirements as follows:

(1) a representation of fact by the debtor,
(2) that was material,
(3) that the debtor knew at the time to be false,
(4) that the debtor made with the intention of deceiving the creditor,
(5) upon which the creditor relied,
(6) that the creditor's reliance was reasonable,
(7) that damage proximately resulted from the representation.

Siriani v. Northwestern Nat'l Ins. Co., of Milwaukee, Wis. (In re Siriani), 967 F.2d 302, (9th Cir. 1992); *In re Gertsch*, 237 B.R. 160, 167 (9th Cir. BAP 1999) (adopting the elements required under the companion section 523(a)(2)(A), with the additional and obvious requirement that the alleged fraud stem from a false statement in writing); *In re Candland*, 90 F.3d 1466, 1469 (9th Cir. 1996); *Kidd*, 278 B.R. at 282, 16 Mont. B.R. at 386-87; *In re Osborne*, 257 B.R. 14, 20 (Bankr. C.D. Cal. 2000).

In discussing the difference between §§ 523(a)(2)(A) and 523(a)(2)(B), the Supreme Court instructs that § 523(a)(2)(B) applies where the debt at issue "follows a transfer or extension induced by a materially false and intentionally deceptive written statement of financial condition upon which the creditor reasonably relied." *Field v. Mans*, 516 U.S. 59, 66, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). On the issue of materiality, a financial statement that leaves "any discrepancy" between the overall impression left by the statement and the endorser's true financial status gives rise to a material falsehood for purposes of § 523(a)(2)(B). *North Park Credit v. Harmer (In re Harmer)*, 61 B.R. 1, 5 (Bankr. D.Utah 1984) (citing cases); *accord*, *Texas Am. Bank, Tyler, N.A. v. Barron, (In re Barron)*, 126 B.R. 255 (Bankr. E.D. Texas 1991) (citing cases). A "long line of cases" has held that in a personal financial statement, the "omission, concealment, or understatement of any of [a] debtor's material liabilities constitutes a 'materially false' statement." *Harmer*, 61 B.R. at 5.

Moreover, even if a debtor does not know of inaccuracies contained in a written financial statement, the United States Court of Appeals for the Ninth Circuit has held that reckless disregard for the truth satisfies the knowledge element of § 523 and its predecessor. *Baker v. Duneman (In re Duneman)*, 12 Mont. B.R. 253, 259 (1993) (citing *In re Houtman*, 568 F.2d 651, 656 (9th Cir. 1978)). "Gross recklessness to the truth also satisfies the fourth ... element of intention of deceiving." *Id.* (citing *Knoxville Teachers Credit Union v. Parkey*, 790 F.2d 490, 492 (6th Cir. 1986)).

While the United States Supreme Court in *Field* adopted justifiable reliance as the appropriate standard under § 523(a)(2)(A), Congress has expressly stated that a creditor's reliance under § 523(a)(2)(B) must be reasonable. The reasonable reliance standard differs from the justifiable standard in that the inquiry regarding the justifiable standard:

> [W]ill thus focus on whether the falsity of the representation was or should have been readily apparent to the individual to whom it was made. This is a less exacting standard than "reasonable" reliance, which would focus on whether reliance would have been reasonable to the hypothetical average person.

4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, § 523.08[1][d] (15th ed.1997).

In *Field*, the Supreme Court reasoned that the more exacting "reasonable" reliance standard in § 523(a)(2)(B) was "tied to the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law." The Supreme Court completed its reasoning:

> The House Report on the Act suggests that Congress wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge.

Field, 525 U.S. at 76-77.

DISCUSSION

In the instant case, it is manifestly clear that Debtor made materially false representations and provided FSB with documentation that was intended to mislead FSB regarding the existence and viability of the Kennelly Family Trust. The Court's ruling is based in part on the documentary evidence presented at the hearing and is based in part on the Court's assessment of Debtor's veracity. Specifically, the Court finds that Debtor was not a credible witness.[4] The Court makes such a finding after observing Debtor's demeanor while testifying and after considering various exchanges that took place between Debtor and her counsel and Debtor and opposing counsel. For instance, Debtor objected strenuously to the introduction of Exhibit 13. Debtor claims that she has no knowledge of the facsimile transmission and testified that she is positive she did not send the fax because she would not have sent the fax without a signature. In response to Debtor's above statement, FSB's counsel began questioning Debtor about the financial statement admitted into evidence without objection at Exhibit 8, which also does not

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[4] The Federal Rules of Bankruptcy Procedure provide that "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." F.R.B.P. 8013. Furthermore, in discussing the clearly erroneous standard applied to findings of fact, the Ninth Circuit Court of Appeals colorfully explains:

> The Sixth Circuit attempted to convey in more earthy terms the arduousness of this endeavor in *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*:
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> > To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish.
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> 866 F.2d 228, 233 (7th Cir.1988).

Fisher v. Roe, 263 F.3d 906, 912 (9th Cir. 2001), *abrogated on other grounds, Mancuso v. Olivarez*, 292 F.3d 939, 944 n. 1 (9th Cir.2002).

contain Debtor's signature. When questioned about Exhibit 8 by FSB's counsel, Debtor acknowledged that her signature did not appear on the financial statement and proceeded to explain: "You know your honor, this is not my handwriting so I really can't testify to this." Debtor continued: "This is obviously not my handwriting, so why would I sign it. I can't answer if this is the financial information that I submitted to the bank when making [the] loan application."

Prior to opportunistically claiming ignorance to exhibit 8, the following exchange had previously taken place between Debtor and her counsel:

Mr. Screnar: The financial statement that is presented here today is the document that you prepared?

Debtor: Yes.

Mr. Screnar: You're familiar with that statement and you've seem it before?

Debtor: Yes, I am.

Mr. Screnar: In preparation of the financial statement, you listed all your assets?

Debtor: I did, yes.

The exchange between Debtor and her counsel clearly suggests that Debtor prepared Exhibit 8. However, even if Debtor did not complete Exhibit 8, she was fully aware of its contents. Yet, when Debtor was questioned about the same Exhibit by FSB's counsel, Debtor decided to claim complete ignorance.

The above inconsistency in Debtor's testimony convinces the Court beyond a shadow of a doubt that Debtor is not a credible witness. Consequently, the Court gives no weight to any of Debtor's testimony.

Turning to the merits of the case *sub judice*, the Court finds that FSB has sustained its burden of showing by a preponderance of the evidence that Debtor fraudulently obtained the loans from FSB. It is quite obvious that Debtor intentionally lead Maggie and FSB to believe that Debtor had access to funds from the Kennelly Family Trust. From the documentary evidence presented at the trial, the Court presumes that some trust in the Kennelly family name was established in 1968. Whether the 1968 trust was funded, whether the trust still exists or whether Debtor would have access to the funds of such trust is not material to the Court's decision today.

Debtor testified that she was creating a trust for the purpose of protecting any money she received from her judgment from Marvin Pervais. Debtor further testified that FSB was fully aware that the funding for the aforementioned trust was to come solely from her lawsuit against Melvin Pervais. The Court simply does not believe Debtor's testimony. Debtor admittedly provided FSB with various pages from a trust identified as "KENN/1968". The Court concludes that the documents relating to the KENN/1968 trust are most likely separate and distinct from any trust that Debtor may have created for the purposes of protecting any money she may receive from her judgment against Melvin Pervais. Furthermore, the Court concludes that Debtor never told FSB that the sole funding for her trust would come from the Melvin Pervais lawsuit. FSB received an assignment of 60 percent of any award or recovery pursuant to Debtor's contract for services rendered for Melvin Pervais. Thus, FSB would certainly have no interest in the trust if it knew that the sole source of funding was coming from funds that had already been assigned to FSB. Indeed, the testimony of Maggie is confirmed by the loan comment sheet at Exhibit 12 which reflects that FSB believed that Debtor would be collecting on the lawsuit and would also have other funds accessible through the Kennelly Family trust: "If the funds do not come from the

settlement then they will use the funds that can be loan[ed] out by the Trust."

Debtor made false representations to FSB and provided FSB with various pages from a trust document as inducement to secure funding from FSB. Debtor knew that her representations were false and further knew, but failed to notify FSB, that the trust documents provided to FSB could or would never be used to provide funding for Debtor's business endeavor. Debtor's sole intent was to deceive FSB. FSB reasonably relied on the verbal and written information provided by Debtor and as a result, FSB has suffered financial loss as a result of Debtor's actions.

IT IS THEREFORE ORDERED that the Court will enter a separate Judgment in favor of First Security Bank and against the Debtor Kyle Kennelly Able; and any amounts still owed by Debtor to First Security Bank on the loans advanced by First Security Bank to Debtor on or about April 26, 2001, shall not be discharged in Debtor's bankruptcy under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B).

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana